Public Prosecutor v LKI Holidays Leisure Sdn Bhd

HIGH COURT (ALOR SETAR) — KEDAH CRIMINAL APPEAL NO 41–201 OF 1995
MOHD HISHAMUDIN J
9 JUNE 1997

Criminal Procedure *— Charge — Defective charge — Accused charged for carrying on a tour operating business without a valid licence — Charge did not give particulars specifying manner in which accused allegedly carried on the tour operating business — Whether charge defective — Whether provision of s 152(3) of the Criminal Procedure Code (FMS Cap 6) complied with — Tourism Act 1992 s 5(2) — Criminal Procedure (FMS Cap 6) s 152(3)*

The respondent was charged with an offence under s 5(2) of the Tourism Act 1992 ('the Act') for 'carrying on a tour operating business' without a valid licence. At the end of the case for the prosecution, the magistrate acquitted the respondent. The Public Prosecutor appealed. Before the High Court, the respondent contended that the charge as it stood was defective and bad at law and in view of the definition of 'tour operating business' in s 2 of the Act, the charge should have contained particulars specifying the manner in which the respondent allegedly carried on the tour operating business.

Held, dismissing the appeal:

(1) In view of the definition of 'tour operating business' as set out in s 2 of the Act, it was essential for the prosecution to state in the charges the particular type of business alleged to have been carried out by the respondent (see p 320F).

(2) Unlike the provisions of the Penal Code (FMS Cap 45) which give specific names to offences prescribed by the Code, s 5(2)(a) of the Act — which was the subject matter of the charge in the instant case — did not give the offence a specific name, it merely stated the prohibited act or activity. That being the case, by virtue of s 152(3) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), it was imperative that 'so much of the definition of the offence' must be stated in the charge and the charge must incorporate the relevant part of the definition of the of 'tour operating business' as set out in s 2 of the Act. The purpose was to give the accused adequate notice of the matter so he is afforded the opportunity to defend himself and the failure to state the definition to the extent necessary so as to give adequate notice would render the charge defective (see p 321A–C).

(3) Judging from the fact that the prosecution had relied merely on documentary evidence, and the documents showed various transactions or activities, it could clearly be inferred that the respondent had indeed been misled by the omission in the charge and the respondent had been highly prejudiced and embarrassed by the defect (see p 322C).

Per curiam:

(1) Prosecuting officers should not take the task of drafting charges lightly. The attitude that drafting charges was merely a mechanical task ought to be discarded. Prosecuting officers must be meticulous and ensure that the provisions of ss 152, 153 and 154 of the CPC are strictly adhered to and should from time to time seek the advice of the deputy public prosecutor especially when it comes to the drafting of less common offences (see p 320A–C); *PP v Syed Bakri* (Ipoh Criminal Revision No 3 of 1955, unreported) followed.

(2) Magistrates too are under a duty to ensure, at the commencement of any criminal case, that the charge had been properly drafted and should it come to the attention of the magistrate that the charge was defective, he should promptly bring it to the attention of the prosecuting officer and thereafter take the necessary measures to rectify the charge (see p 320C–D); *PP v Syed Bakri* (Ipoh Criminal Revision No 3 of 1955, unreported) followed.

[Bahasa Malaysia summary

Penentang dipertuduhkan dengan kesalahan di bawah s 5(2) Akta Industri Pelancongan 1992 ('Akta tersebut') kerana 'menjalankan perniagaan kendalian pelancongan' tanpa lesen yang sah. Di penghujung kes pihak pendakwa, majistret membebaskan penentang. Pendakwa Raya membuat rayuan. Di hadapan Mahkamah Tinggi, penentang menghujahkan bahawa pertuduhan seperti mana yang dibiarkan adalah cacat dan tidak elok di sisi undang-undang dan memandangkan tafsiran 'perniagaan kendalian pelancongan' dalam s 2 Akta tersebut, pertuduhan sepatutnya mengandungi butir-butir yang menentukan cara dalam mana penentang dikatakan menjalankan perniagaan kendalian pelancongan.

Diputuskan, menolak rayuan:

(1) Memandangkan tafsiran 'perniagaan kendalian pelancongan' seperti yang dinyatakan dalam s 2 Akta tersebut, adalah perlu untuk pihak pendakwa menyatakan jenis khas perniagaan yang dikatakan telah dijalankan oleh penentang dalam pertuduhan-pertuduhan (lihat ms 320F).

(2) Berlainan daripada peruntukan-peruntukan Kanun Keseksaan (NMB Bab 45) yang memberikan nama spesifik kepada kesalahan yang ditetapkan oleh Kanun tersebut, s 5(2)(a) Akta tersebut — yang merupakan perkara subjek pertuduhan dalam kes ini — tidak memberikan kesalahan nama yang spesifik, ia cuma menyatakan perbuatan atau kegiatan yang dilarang. Oleh yang demikian, disebabkan s 152(3) Kanun Acara Jenayah (NMB Bab 6) ('KAJ'), adalah mustahak bahawa 'seberapa pengertian kesalahan itu' mestilah dinyatakan dalam pertuduhan dan pertuduhan mesti menggabungkan bahagian tafsiran

'perniagaan kendalian pelancongan' yang relevan seperti yang dinyatakan dalam s 2 Akta tersebut. Tujuan adalah untuk memberikan tertuduh notis yang memadai tentang perkara itu supaya dia berpeluang membela diri dan kegagalan untuk menyatakan tafsiran setakat mana yang perlu bagi memberi notis yang memadai akan menyebabkan notis menjadi cacat (lihat ms 321A–C).

(3) Memandangkan bahawa pihak pendakwa telah bergantung pada keterangan dokumentar sahaja, dan dokumen-dokumen menunjukkan pelbagai transaksi atau kegiatan, ia boleh disimpulkan dengan jelas bahawa penentang memang telah diperdayai oleh peninggalan dalam pertuduhan dan penentang telah amat dimudaratkan oleh kecacatan (lihat ms 322C).

Per curiam:

(1) Pegawai pendakwa tidak patut memandang ringan terhadap tugas mendraf pertuduhan. Sikap bahawa mendraf pertuduhan hanyalah tugas mekanikal patut dibuang. Pegawai-pegawai pendakwa mestilah teliti dan memastikan bahawa peruntukan-peruntukan ss 152, 153 dan 154 KAJ dipatuhi secara ketat dan seharusnya dari masa ke semasa meminta nasihat timbalan pendakwa raya terutamanya apabila ia berhubung dengan mendraf kesalahan yang tidak begitu umum (lihat ms 320A–C); *PP v Syed Bakri* (Semakan Jenayah Ipoh No 3 tahun 1955, tidak dilaporkan) diikut.

(2) Majistret-majistret juga berada di bawah kewajipan untuk memastikan, pada permulaan mana-mana kes jenayah, bahawa pertuduhan telah didraf dengan betulnya dan andainya ia dimaklumkan kepada majistret bahawa pertuduhan adalah cacat, beliau harus menarik perhatian pegawai pendakwa dan selepas itu mengambil langkah yang perlu untuk membetulkan pertuduhan (lihat ms 320C–D); *PP v Syed Bakri* (Semakan Jenayah Ipoh No 3 tahun 1955, tidak dilaporkan) diikut.]

Notes

For cases on defective charge, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 677–694.

Cases referred to

Lew Cheok Hin v PP [1956] MLJ 133 (refd)
PP v G Choudhury [1981] 1 MLJ 76 (refd)
PP v Syed Bakri (Ipoh Criminal Revision No 3 of 1955, unreported) (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 152, 152(3), 153, 154, 156

Penal Code (FMS Cap 45)
Tourism Industry Act 1992 ss 2, 5(2), (2)(a), (3)

Appeal from: Summons Case No 87–25 of 1994 (Magistrate's Court, Langkawi)

Abdul Razak Musa (Deputy Public Prosecutor) for the appellant.
Gooi Hock Seng (*Shan & Gooi*) for the respondent.

Cur Adv Vult

Mohd Hishamudin J: The respondent, a company, was prosecuted at the Magistrate's Court, Langkawi for an offence under s 5(2) of the Tourism Industry Act 1992 ('the Act'). The charge states:

> Bahawa kamu pada 22 Ogos 1993 lebih kurang jam 12.05 tengah hari bertempat di No 7, Jalan Pandak Mayah 4, Bandar Baru, Kuah, 07000 Langkawi, Kedah telah menjalankan perniagaan kendalian pelancongan tanpa mempunyai lesen yang dikeluarkan oleh Pesuruhjaya Pelancongan di bawah s 7(1) Akta Industri Pelancongan 1992 dan dengan itu telah melakukan kesalahan di bawah s 5(2) Akta yang sama yang mana jika disabitkan boleh dihukum di bawah s 5(3) Akta yang sama.

The respondent claimed trial.

At the commencement of the trial, the learned defence counsel for the respondent — by way of preliminary objection — objected to the charge on the ground that it was lacking in material particulars. The learned trial magistrate overruled the objection and proceeded with the trial. However, at the end of the case for the prosecution, after hearing the submission of no case to answer by the defence counsel and the submission in reply of the prosecuting officer, the magistrate acquitted the respondent on the grounds that the prosecution had failed to establish a case which required the defence to rebut.

The Public Prosecutor now appeals against the decision of the magistrate's court.

In this appeal, learned counsel for the respondent, En Gooi Hock Seng, who was also the defence counsel in the court below, in reply to the submission of the learned deputy public prosecutor, raised the same point of law pertaining to the charge. Learned counsel maintained that the charge was defective and bad in law. He contended that in view of the definition of the term 'tour operating business' as in s 2 of the Act, defining the meaning of that term, the charge should contain particulars specifying the manner in which the respondent had allegedly carried out the tour operating business.

Now, s 5(2) reads:

> Tourism enterprises to be licensed
>
> (2) No person shall carry on or operate, or hold himself out as carrying on or operating —

A (a) a tour operating business; or

(b) a travel agency business,

unless it is a company and holds a valid licence granted under this Part.

It will be noted that there is no reference in the charge either to limb (a) or to limb (b) of sub-s (2). However, it is obvious that it is limb (a) that B was invoked by the prosecution because of the use of the words 'menjalankan perniagaan kendalian pelancongan' ('carried on a tour operating business') in the charge.

What is a 'tour operating business'? The meaning of this term is given by s 2 of the Act as follows:

C 'tour operating business' means any business of providing all or any of the following services:

(a) arranging for sale or commission any transportation, accommodation, tour services or any other incidental services for tourists within or outside Malaysia;

D (b) organizing or conducting for sale or commission inbound or outbound tours;

(c) providing conveyances for hire to tourists;

(d) any other services incidental to any of the services enumerated above; ... .

Section 2 further defines the terms 'inbound tours', 'outbound tours' E and 'tourists'.

From the above provisions, it will be appreciated that the Act assigns a certain — but rather wide — meaning to the term 'tour operating business'. The term encompasses any of the services as enumerated in (a)–(d) above.

F Now, coming to the evidence, I observe that the prosecution had not called any person to testify that, while being a tourist, he had engaged the respondent company for the purpose of obtaining such services as transportation, accommodation or conducted tours. Only four witnesses were called to testify for the prosecution. PW1 and PW2 were enforcement G officers from the Malaysian Tourism Promotion Board. They had carried out the raid at the premises of the respondent. PW3, an assistant administrative officer with the State Government of Penang, was the investigating officer. The last witness called, PW4, was an officer from a company operating a tourist business who testified that his company had received a quotation from the respondent.

H It is clear that looking at the manner in which the case was presented, the prosecution, for the purpose of proving its case, relied solely on the documents which were seized by the enforcement officers from the respondent's premises. The defence objected to the admissibility of these documents on the ground that the respective makers of the documents I were not called.

Back to the point raised by learned counsel, first, I wish to say this. Sitting as an appellate judge, like I do now, quite often I have observed from the appeal record of the lower court that charges are badly drafted.

This observation has been bothering me for quite some time and I think I should take the opportunity here to comment that prosecuting officers should not take the task of drafting charges lightly. The attitude that drafting charges is a mere mechanical task ought to be discarded. Prosecuting officers should take the task seriously. They should be meticulous and at the same time ensure that the provisions of ss 152, 153 and 154 of the Criminal Procedure Code (FMS Cap 6) ('the CPC') are strictly adhered to. They should, from time to time, seek the advice of the deputy public prosecutor, especially when it concerns the drafting of less common offences (for instance, like the one in the present case). Magistrates too are under a duty to ensure at the commencement of any criminal case before them that the charge has been properly drafted. Should it come to the notice of the presiding magistrate that the charge is defective, he should promptly bring it to the attention of the prosecuting officer, and thereafter take the necessary measures to rectify the defect. Let me remind magistrates and prosecuting officers of the advice of Thomson J (who later became our first Lord President) given more than 40 years ago. In his oral judgment in *PP v Syed Bakri* (Ipoh Criminal Revision No 3 of 1955, unreported), his Lordship said:

> I have repeatedly emphasized that in framing charges prosecution officers should adhere as closely as possible to the wording of the statute constituting the offence which is charged and that magistrates should be at pains to see that this is done. If it is done, the prosecution know what they have to prove and the accused person knows what is charged against him. If it is not done, then there is the danger of a muddle of the sort that has come to light in this case.

In the present case, in my judgment, the contention of the learned defence counsel regarding the charge has merit. In view of the definition of 'tour operating business' as set out in s 2 of the Act, it is, to my mind, essential for the prosecution to state in the charge the particular type of business allegedly carried out by the respondent. For example, if the prosecution is alleging that the respondent had carried out the business of arranging transportation for tourists, then this particular allegation must be specifically stated in the charge. Likewise, it must be stated in the charge if the prosecution is alleging that the respondent had carried out the business of arranging accommodation for tourists without a licence. And, taking the matter further, if the allegation is that the respondent had carried out the business of arranging transportation *and* accommodation for tourists, then the prosecution must prefer two separate charges: one for the business of arranging accommodation and the other for the business of arranging transportation.

In this connection, I wish to remind the prosecution of the provisions of s 152 of the CPC, in particular sub-s (3) which stipulates:

> Form of charge
>
> (3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

Reverting to s 5(2)(a) of the Act, it will be observed that unlike the provisions of the Penal Code (FMS Cap 45), which gives specific names to the offences prescribed by the Code (like murder, theft, rape, etc), this provision of the Act — which is the subject matter of the charge in the instant case — does not give the offence a specific name: it merely states the prohibited act or activity. It states, inter alia, that the carrying on of a tour operating business without a licence is prohibited (see limb (a) of sub-s (2)). And sub-s (3) of s 5 provides the penalty or sanction for the breach of that prohibition. Now, this being the case, by virtue of the above sub-s (3) of s 152 of the CPC, it is imperative that 'so much of the definition of the offence' must be stated in the charge. The purpose is to give the accused person adequate notice of the matter so that he is afforded the opportunity to defend himself. Failure to state the definition (to the extent necessary so as to give adequate notice) would render the charge defective. It has been held that a defective charge is one that does not have sufficient particulars to give notice to the accused of the manner in which he is alleged to have committed the offence (*PP v G Choudhury* [1981] 1 MLJ 76).

In the context of s 5(2)(a) of the Act, I cannot bring myself to accept that in order to satisfy the requirement of s 152(3) of the CPC, the prosecution need only repeat in the charge the wording as found in limb (a), that is to say, to incorporate merely the words 'tour operating business' — as was done in the present case. In my judgment, what is required by s 152(3) of the CPC to be stated in the charge, in particular, by the words 'so much of the definition of the offence' is more than that: the charge must also incorporate the relevant part of the definition of 'tour operating business' as set out in s 2 of the Act; and which relevant part of the definition is to be incorporated in the charge would, of course, depend on the evidence that the prosecution intended to adduce. The charge would be defective as well as vague and meaningless if its contents is confined only to the wording of s 5(2)(a). Indeed, the fundamental principle is that the offence must be stated with sufficient precision to enable the accused to meet the charge (*Lew Cheok Hin v PP* [1956] MLJ 133).

In the present case, I do, therefore, accept the defence's contention that the charge is vague and bad in law.

Of course, I am mindful of the provision of s 156 of the CPC which provides:

> Effect of errors
>
> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission.

The rationale behind this provision is not difficult to ascertain: to minimize acquittals resulting from some technical defects in the charge. Now, in the instant case, was the respondent in fact misled by the omission to incorporate in the charge the relevant part of the definition of 'tour operating business'?

Since the defence was not called, in order to determine whether or not the respondent was in fact misled by the omission, my judgment would have to depend on the extent of the defect and also on the evidence of the prosecution. As I have said earlier, the prosecution was relying merely on documentary evidence. Various documents were tendered as evidence before the magistrate such as a voucher book, a receipt book, a log book, a rubber stamp bearing the chop 'LKI Holidays and Leisure Sdn Bhd', letters stating quotations, etc. PW1 and PW2 also gave evidence regarding the display of a sign board at the premises of the respondent company stating 'LKI Holidays and Leisure Sdn Bhd'. Now, judging from the fact that the prosecution had relied merely on documentary evidence — and that the documentary evidence shows various transactions or activities, some dating back to 1992 (whereas the charge alleges that the offence took place on 22 August 1993) — I have no difficulty in inferring that the respondent had in fact been misled by the omission in the charge. Indeed, the respondent has been highly prejudiced and embarrassed by such defect.

This appeal by the prosecution against the acquittal is therefore dismissed.

Appeal dismissed.

Reported by Lew Chee Seong